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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 371

NATIONAL BROADCASTING COMPANY, INC.,
Petitioner,

PHILCO CORPORATION,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

National Broadcasting Company, Inc. ("NBC") prays that a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit to review a judgment of that court reversing an order of the Federal Communications Commission ("Commission").

The Commission's order dismissed a protest by respondent Philco Corporation ("Philco") to the renewal of NBC's licenses to operate its television and radio stations in Philadelphia.

Opinions Below

The majority and dissenting opinions of the Court of Appeals (Appendix A, *infra*, R. 95-103)[1] and the opinion

[1] Pages of the record certified from the court below are herein referred to by "R."; appendices to this petition are referred to herein as "App.".

and order of the Commission (Appendix B, *infra*, R. 74-91) have not yet been reported except at 17 Pike & Fischer R. R. 2054 and 15 Pike & Fischer R. R. 965 respectively.

Jurisdiction

The judgment of the Court of Appeals is dated and was entered on June 19, 1958 (App. A, p. 9a, R. 104). Transmission to the Commission of the court's opinion and a certified copy of its judgment has been stayed by order of the Court of Appeals until September 17, 1958.

The jurisdiction of this Court is invoked under the Act of June 25, 1948, c. 646, 62 Stat. 928, 28 U. S. C. §1254(1), and under the Act of June 7, 1934, c. 426, 48 Stat. 926, as amended, 47 U. S. C. §402(j).

Questions Presented

May a person who is not engaged in broadcasting, and who does not compete with any broadcasting service, protest and appeal the Commission's renewal of a broadcast license?

Must the Commission and the courts entertain protests and appeals by persons whose only claim to standing is that a Commission order may or will injure them economically in a business not related to broadcasting?

Did the majority of the Court of Appeals commit reversible error in extending this Court's prior decisions by holding that respondent is entitled to protest and appeal the Commission's renewal of petitioner's broadcast licenses, where respondent did not claim to be injured by such renewals except as a manufacturer and as an advertiser, and where the Commission found that respondent's alleged injury was speculative, remote and insubstantial?

Statutes Involved

The principal statutes involved are the protest and appeals sections of the Communications Act,[2] 47 U. S. C. §§309(c) and 402(b), relevant portions of which are printed at Appendix C, *infra*.

Statement of the Case

NBC is engaged in the business of operating national television and radio networks. In addition, pursuant to Commission authorization, NBC owns a limited number of television and radio stations (R. 7). The stations here involved, WRCV and WRCV-TV in Philadelphia, were purchased by NBC in 1956 after the Commission had approved the purchase as in the public interest under Section 310(b) of the Act, 47 U. S. C. §310(b). *National Broadcasting Co., Inc.*, 13 Pike & Fischer R. R. 374 (1955). No protest was filed in that proceeding.

In May of 1957, NBC applied for renewal of these Philadelphia station licenses for the regular three-year term. The Commission granted the applications on July 18, 1957 (R. 5), after finding that the public interest, convenience and necessity would thereby be served, as provided in Section 309(a) of the Act, 47 U. S. C. §309(a).

On August 14, 1957, respondent filed a protest to these renewal authorizations (R. 5-27), purporting to do so under Section 309(c) of the Act, 47 U. S. C. §309(c). That section requires a protestant to specify facts showing that he is a "party in interest" to the grant he seeks to challenge, and to state with particularity the matters on which

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[2] The Communications Act of 1934, c. 652, 48 Stat. 1064, as amended, 47 U. S. C. §§151 *et seq.*, fully cited in Table of Statutes, hereafter called the "Act".

he relies to support his contention that the grant was not in the public interest.

Respondent's claim to be a party in interest was not and is not based on any actual or competitive interest in broadcasting. Respondent had no such interest at the time its protest was filed, nor does it now. It does not own any broadcast station, does not have any application pending for a station license, and does not compete with any broadcast licensee (R. 34).

Instead, Philco is a manufacturer of various products which it sells in competition with others, including NBC's parent company, Radio Corporation of America ("RCA"). It claims standing to protest primarily on the ground that the Commission's renewal grants to NBC allegedly injure Philco "as a manufacturer competing with RCA in the sale of its products". Philco alleges that these products include air conditioners, home laundry equipment, radio and television receivers, ranges and refrigerators (R. 6).

In support of this contention the protest states that NBC's stations describe themselves as "a service of RCA" during station identification and also favorably mention RCA at other times.[3] The protest argues that these prac-

[3] Such references are a normal practice in the broadcasting industry. Examples are readily available: WTOP-TV identifies itself as "The TV station of the Washington Post, Washington's favorite home newspaper"; the stations owned by the General Electric Co., which manufactures and sells electronic products in competition with Philco and RCA, identify themselves as "General Electric" stations and use the General Electric trade-mark; the name "Columbia", used on phonographs and phonograph records produced by Columbia Broadcasting System, Inc., is regularly heard on stations owned by that company (R. 40); prior to 1953, a Philco subsidiary owned this same Philadelphia television station, and Philco itself followed a similar practice (R. 40, 94). Presumably, therefore, Philco would not see fit to complain in this respect if NBC were named the "RCA Broadcasting Company".

tices afford RCA "preferential publicity which is not available to Philco or other manufacturers who compete with RCA" (R. 9). However, the protest does not claim that such allegedly preferential publicity for RCA was in any respect derogatory of Philco or its products, or caused Philco lost sales or other specific injury, or that NBC refused to carry any advertising which Philco might wish to place on any NBC station or facility, or that Philco has been discriminated against in any respect in obtaining access to any advertising outlet.

In fact Philco has had, and if it so chose could now have, the very type of publicity of which it complains. A Philco subsidiary at one time owned the television station here involved (then known as WPTZ) but sold it to Westinghouse Broadcasting Company ("Westinghouse") in 1953 (App. B, pp. 2b-3b; R. 76). Westinghouse is a subsidiary of Westinghouse Electric Corporation, a competitor of both Philco and RCA, and owns a number of television and radio stations which identify themselves as "Westinghouse" stations. During the period when Philco owned WPTZ, it was regularly identified on the air as "your Philco station"; WPTZ also referred to Westinghouse as part of its station identification in exchange for reciprocal references to Philco on Westinghouse's radio station in Philadelphia (R. 40, 94). While respondent chose in 1953 to discontinue this arrangement and sell its television station to its competitor for the record price of $8,500,000 (R. 32), it has always been free to purchase another "Philco station".

The protest secondarily asserts that Philco is a party in interest to the renewals "as an advertiser" affected by NBC's television network operations (R. 10). The specific operations here attacked have been and still are accepted industry practices, the so-called "option time" and "must

buy" arrangements of NBC and other networks[4], which allegedly render sponsorship of network television programs "prohibitively expensive" (R. 10). It is worthy of note, however, that many of Philco's competitors have found the sponsorship of network programs on NBC and other networks to be well worth the price. Since these network practices do not result from NBC's ownership of the Philadelphia stations, the Commission found no merit in Philco's contention that, as an advertiser, it would be injured by the renewal grants (App. B, p. 13b, R. 86). The Court of Appeals did not review this finding (App. A, p. 3a, R. 97).

On the basis of this alleged standing, coupled with a broadside recital of various unproven and stale charges ranging over the entire history of RCA and NBC (R. 21-26), the protest demands that the Commission order a hearing on a multitude of "issues" (App. B, p. 8b, R. 26-27), the hearing of which could well take several years.[5]

The Commission dismissed the protest on the ground that Philco lacked standing to bring it. The Commission then proceeded to consider whether any of the matters alleged in Philco's protest would merit a hearing on the

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[4] These arrangements are permissible under the Commission's Rules, although the Commission has been currently considering recommendations that it restrict them (Commission Docket No. 12285). Philco could have appeared in that proceeding, but chose not to do so.

[5] Among other things, the protest seeks to incorporate by reference the issues raised in litigations pending against RCA and NBC (App. B, p. 6b, R. 11-17). One of these pending litigations is a treble damage antitrust action by Philco against RCA and others in the United States District Court for the Eastern District of Pennsylvania (Civil Action No. 21,923) in which Philco seeks $150,000,000 in damages (R. 29). That action was commenced on January 17, 1957, seven months prior to the filing of Philco's protest, and includes charges against RCA paralleling many of the allegations sought to be bootstrapped into this proceeding.

Commission's own motion, but found no basis in the protest for such a hearing (App. B, pp. 16b-17b, R. 89-90).

Respondent appealed to the court below, purporting to do so under Section 402(b)(6) of the Act, 47 U. S. C. §402(b)(6), and NBC intervened. The Court of Appeals, Judge Madden dissenting, held that Philco has standing to protest and appeal the Commission's renewal grants, and remanded the case to the Commission for further proceedings consistent with the court's opinion.

Reasons for Granting the Writ

(1) This Case Presents An Important Public Question Concerning The Qualifications Required For Standing To Challenge Commission Grants Which Should Be Authoritatively Settled By This Court.

The majority of the Court of Appeals found the question here presented a novel and difficult one and resolved this difficulty by extending the right to contest Commission action beyond all previous limits (App. A, pp. 4a-5a, R. 98-99).[6] The minority refused to enter this "new field" (App. A, p. 8a, R. 102), pointing out:

> "* * * the decision of the Court * * * represents an act of generosity with regard to the time and energy of the Federal Communications Commission (FCC), which is completely unjustified. I think that there is not even a possibility that the further proceedings which this decision imposes upon the FCC will result in anything useful." (App. A, p. 6a, R. 100)

[6] The difficulty which the majority of the court had persisted even after the opinion was delivered. This is evident from the fact that the majority opinion as originally rendered was changed so as to state that only a so-called "preferential" (as distinguished from "an") "economic advantage" obtained through use of the licensed facilities would give standing to a non-broadcasting competitor of the licensee's parent (App. A, p. 6a, R. 100).

If the majority decision is allowed to stand, it will permit persons having no direct or competitive interest in the broadcasting industry to protest and appeal Commission determinations with which they have no legitimate concern. The result would be an unprecedented additional burden on the Commission and the appellate courts, to the detriment of the work of both and of the public at large, and an open invitation to the litigious to disrupt the industry by wholesale protests against Commission authorizations.

The Act does not expressly define who is a "party in interest" entitled to the extraordinary status of protestant, and who qualifies as a "person aggrieved" having the right to appeal.[7] When Congress enacted the protest section in 1952, it recognized the danger of giving "party in interest" too broad a construction, but was of the view that the term had already been adequately defined by judicial decision. The Senate Report on the protest bill stated:

> "Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The Committee does not so construe the term 'party in interest'; 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U. S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the

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[7] A "party in interest" entitled to protest qualifies as a "person who is aggrieved or whose interests are adversely affected" by a Commission order denying his protest, and may appeal such an order under 47 U. S. C. §402(b)(6). *Metropolitan Television Co.* v. *United States*, 221 F. 2d 879, 880 (D. C. Cir. 1955).

Sanders case (309 U. S. 470)." S. Rep. No. 44, 82d Cong., 1st Sess., p. 8 (1951).

The two cases referred to in the Senate Report, *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470, and *Federal Communications Commission* v. *National Broadcasting Co., Inc.* (*KOA*), 319 U. S. 239, held that radio station owners had standing to appeal Commission orders which had a direct and substantial adverse effect on their station operations. In *Sanders*, the owner of a station which was already in financial difficulty was held entitled to appeal the grant of a construction permit for a new station to serve the same community in competition with the appellant. In *KOA*, an existing station was held to have standing to appeal a Commission order authorizing substantial electrical interference with the appellant's signal.

Even in the *KOA* case, however, both this Court and the Court of Appeals divided sharply on the question whether the appellant had a sufficient interest in the Commission's action to be a "person aggrieved" within the meaning of the Act. Judge (later Mr. Justice) Rutledge wrote in the court below:

> "It seems not unreasonable to read the [*Sanders*] opinion as requiring by implication that there be probable injury of a substantial character. So much by way of limitation seems necessary to prevent vindication of the public interest from turning into mass appeals by the industry at large, with resulting hopeless clogging of the administrative process by judicial review." *National Broadcasting Co., Inc.* v. *Federal Communications Commission*, 132 F. 2d 545, 548 (D. C. Cir. 1942).

This Court affirmed the Court of Appeals (at 319 U. S. 239) with three justices abstaining and Justices Frankfurter and Douglas dissenting.[8]

In the present case the protest was filed by one who is not even a member of the "industry at large", and whose alleged injury moreover is both speculative and remote from the Commission's action. Respondent has no interest in the broadcasting business, nor does it claim to have any better standing to challenge the Commission's grants to NBC than any other competitor of RCA, or any other national advertiser. Philco contends, in effect, that the number of persons who could protest and appeal these and other grants to NBC is virtually unlimited.[9]

But the significance of the majority's holding here goes far beyond its obvious effect on this and future applications to the Commission by NBC. A substantial portion of the Commission's present licensees[10] are also engaged in busi-

[8] In his dissent, Mr. Justice Douglas stated:

> "* * * if we accept as constitutionally valid a system of judicial review invoked by a private person who has no individual substantive right to protect but who has standing only as a representative of the public interest, then I think we must be exceedingly scrupulous to see to it that his interest in the matter is substantial and immediate. Otherwise we will not only permit the administrative process to be clogged by judicial review; we will most assuredly run afoul of the constitutional requirement of case or controversy." 319 U. S. at p. 265.

See also the dissenting opinion in *Scripps-Howard Radio, Inc. v. Federal Communications Commission*, 316 U. S. 4, 20-21.

[9] In both 1956 and 1957, about 10,000 companies used one or more of three national advertising media (consumer magazines, network television and Sunday newspaper supplements). "National Advertiser Investments, 1956" and "National Advertiser Investments, 1957", published by Leading National Advertisers, Inc. In addition, there are thousands of organizations competing in the various fields in which RCA and its subsidiaries compete. R. 37.

[10] Including such multiple owners as Westinghouse, American Broadcasting-Paramount Theatres, Inc., Columbia Broadcasting System, Inc., and Crosley Broadcasting Corporation.

nesses other than broadcasting, or are under common ownership with companies engaged in other businesses. The decision below exposes these licensees to similar protests and appeals by non-broadcasters, and thus compounds its effect on the Commission and the appellate courts.

While the specific problem thus presented has not come before this Court until now, this Court's previous decisions follow a line of reasoning which was ignored in the instant decision by the majority of the Court of Appeals. The decision below clearly poses the prospect of "hopeless clogging of the administrative process by judicial review", viewed with justifiable alarm in the *KOA* case, even though that case concerned one who was both in the broadcasting industry and who was directly and substantially injured by the Commission's action. See also, *Federal Communications Commission* v. *WJR*, 337 U. S. 265, fn. 14 at p. 280, stating that the *KOA* case should not be read as giving station owners standing in all interference cases.

Clarification by this Court of the meaning of "party in interest" and "person aggrieved" as used in the protest and appeals sections of the Act is therefore urgently required in the interest of the Commission, the courts, the industry and the public which the industry serves.

(2) The Decision Below Conflicts With Principles Established By Decisions Of Various Circuit Courts, Including Decisions By The Court Below.

In dismissing respondent's protest, the Commission relied on this Court's decisions in the *Sanders* and *KOA* cases, and on Court of Appeals' decisions in the District of Columbia Circuit and in the Second Circuit (App. B, p. 11b, R. 84). The Commission has consistently interpreted these and other cases as establishing the principle

that one who would qualify as a protestant must prove that he is likely to suffer substantial competitive injury as a direct and immediate result of the authorization he seeks to challenge (App. B, pp. 11b-12b, R. 84-85).

Testing this protest against that rule, the Commission held it insufficient to give Philco status under the statute. To the extent that Philco rested its claim on NBC's network practices, the Commission found that:

> "Since renewal or lack of renewal of WRCV-TV could not affect Philco with respect to this category of action, they do not, even if we assume *arguendo* that they in fact injure Philco, make it aggrieved by the protested grant." (App. B, p. 13b, R. 86)

With respect to respondent's remaining allegation of injury, that NBC's continued operation of the television station here involved aids RCA in competing with Philco, the Commission held:

> "We think it clear that any real impact on Philco's competitive position of such activities is so speculative and so indirect that it would make a mockery of the concept of 'party in interest' to apply it to these facts," (App. B, p. 13b, R. 86-87)

The injury Philco asserts, if it exists at all, does not result from the Commission's action here in any realistic sense. Philco's alleged injury is so remote from the protested grant that it does not even occur in the broadcasting industry or in a business competitive with broadcasting,[11]

[11] Until the instant case, the furthest extension of the right to protest Commission action was *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 514 fn. 8 (D. C. Cir. 1955). There, a newspaper company which claimed injury as a result of a Commission grant (of a license for a television station which would compete in the same area with the newspaper for advertising revenues) was held entitled to protest that grant. While

and so speculative that there is no specification of probable damage to support it. Yet the majority of the Court of Appeals reversed the Commission and held that Philco had established a sufficiently substantial injury, resulting sufficiently directly and immediately from the Commission's renewal grant, to give Philco the status of a protestant and appellant. If this be true, the flood gates are open and virtually anyone who chooses to file a protest may be held to have enough of an interest in a grant to protest it.

While the majority of the Court of Appeals did refer to the principle that one who seeks to challenge Commission action must show substantial, direct and immediate injury resulting from the grant (App. A, p. 5a, R. 99), the majority's holding is nothing short of a nullification of that principle. Recognizing the dangers inherent in this decision, the majority attempted to limit its effect. The opinion purports to give standing only in the specific situation where a manufacturer protests the renewal of a license for a broadcast station wholly owned or controlled by a competitor, and where the station is being used to give the manufacturer's competitor a so-called "preferential" (but not otherwise defined) economic advantage. The majority then purports to "leave other situations for other cases" (App. A, pp. 5a-6a, R. 100).

These attempts to patch up the rule that the holding itself violates are inconsistent with the rest of the opinion and ineffective. The majority opinion itself elsewhere recognizes (App. A, p. 5a, R. 99), that it is the *likelihood*

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the soundness of that extension of the right to protest is doubtful, the *Clarksburg* decision is not authority for the instant holding in any event. That case at most held that the relevant "industry" included a newspaper competing with a broadcast station for advertising revenues.

of substantial injury that gives standing to protest, rather than the sustaining of actual injury. Accordingly, there can be no logical reason for allowing a protest to a renewal grant but not to an original grant where the same injury is threatened. Nor can the majority's insertion of the word "preferential" into the original opinion distinguish this case from other cases in which a station is owned by one engaged in some other business. As we have already seen, identification of the station owner is a normal industry practice. Whatever advantage is thus obtained by the owner is always "preferential" in the sense in which that word is used in the majority's opinion (*i.e.*, in the sense that no one except the owner can be truthfully identified as the owner of the station).

Moreover, the majority did not even attempt to limit the application of the basic fallacy contained in their ruling—the fallacy that the status of a would-be protestant and appellant turns on the activities of the licensee rather than on whether the protestant is injured by the action of the Commission. That premise of the majority's holding is completely at odds with the clear language of the Act that a "person aggrieved" is one whose interests are "adversely affected *by any order of the Commission*" described therein. 47 U. S. C. §402(b) (6), App. C, p. 3c. A licensee's conduct may, of course, afford grounds for a complaint to the Commission or the courts, and may also be relevant on the merits in determining whether a protested grant was in the public interest. However, standing to attack Commission action can be based only on the effects of that action. See *KFAB Broadcasting Co.* v. *Federal Communications Commission*, 177 F. 2d 40 (D. C. Cir. 1949), where the court below dismissed an appeal by an applicant for a station license, stating:

"If appellant was aggrieved, it was by a subsequent event and not by the order of the Commission." (p. 42)

The actual breadth of the majority's holding here is well illustrated by the "department store" analogy on which the majority opinion relies (App. A, p. 5a, R. 99). That analogy clearly implies that the majority would permit the grant of a station license to a department store in a large metropolitan area to be protested by any retail store in the vicinity. In that event, it is difficult to conceive what limits, if any, will keep future protests within manageable bounds.

There is a clear conflict in principle between the decision below and prior decisions by the same court in which even broadcast licensees[12] and applicants for broadcast licenses[13] have been held to lack standing to challenge Commission action even though they had far more substantial and immediate interests than Phileo has here. The instant decision is irreconcilable with these holdings in the broadcasting field.

Moreover, the reasoning of the majority below is also in conflict with the rationale of decisions in the Second and Seventh Circuits in cases involving other industries.

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[12] *Pittsburgh Radio Supply House* v. *Federal Communications Commission*, 98 F. 2d 303 (D. C. Cir. 1938). See also, *WOKO, Inc.* v. *Federal Communications Commission*, 109 F. 2d 665 (D. C. Cir. 1939); however, in apparent reliance on this Court's decision in the *Sanders* case, the *WOKO* case seems to have been implicitly overruled by later cases in the same court such as *Clarksburg Publishing Co.* v. *Federal Communications Commission*, 225 F. 2d 511, 514 fn. 8 (D. C. Cir. 1955), discussed above.

[13] *Mansfield Journal Co.* v. *Federal Communications Commission*, 173 F. 2d 646, 647 (D. C. Cir. 1949); *KFAB Broadcasting Co.* v. *Federal Communications Commission*, 177 F. 2d 40, 42 (D. C. Cir. 1949); *Southwestern Publishing Co.* v. *Federal Communications Commission*, 243 F. 2d 829, 833 (D. C. Cir. 1957); see also, *St. Louis Amusement Company* v. *Federal Communications Commission*, . F. 2d (D. C. Cir. August 28, 1958).

In *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F. 2d 116 (2d Cir. 1943), the court found it had no jurisdiction to entertain an appeal by sugar suppliers from an order of the Federal Security Administrator which permitted other competitive sweeteners to be used in fruit canning without being named on the can label, as had previously been required. The Second Circuit held that appellants were not "adversely affected" by the order merely because it released their competitors from a previous restriction. It stated in part:

> "In order to prevent * * * obstruction to the orderly administration of the statute by virtually unlimited petitions to review, it is necessary that the class of petitioners who have 'standing to sue' be confined to those who can show some direct adverse affect traceable with reasonable certainty to the regulations promulgated." (p. 120)

In reaching the above decision, the court relied on its previous analysis of the "person aggrieved" concept in *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir. 1943), *cert. granted*, 319 U. S. 739, *vacated as moot*, 320 U. S. 707, where it had arrived at a contrary conclusion. There, the Second Circuit held that an association of coal consumers had standing to challenge an order fixing minimum prices for bituminous coal because the consumers were directly and substantially aggrieved thereby.

It should be noted that decisions such as *Associated Industries*, involving consumers' challenges to price-fixing orders, have no real application here as Judge Madden pointed out in his dissent (App. A, pp. 7a-8a, R. 102). Congress has clearly not given the Federal Communications Commission any price-fixing authority in the broadcasting field, but has on the contrary left rates in this field to be determined by the forces of free competition. In

addition, in the cases arising in other industries, the order challenged did in fact threaten direct and immediate injury to the consumers held to have standing to challenge it.

Further, it is evident that even consumers in industries subject to price regulation have no standing to challenge any and all agency action. The agency action must directly and immediately affect them in their capacity as consumers. *Murphy* v. *United States*, 252 F. 2d 389 (7th Cir. 1958), dismissed an appeal by a group of telephone subscribers who sought to challenge a Commission order approving the purchase of one telephone company by another. The subscribers contended that the acquisition was made at an excessive price and violated the antitrust laws. The Seventh Circuit held that the subscribers had no standing to raise these issues, stating:

> "To hold that every Tom, Dick and Harry can attack the Commission's order would be to render meaningless Section 402(a) of Title 47 which limits the right of review to a 'person who is aggrieved or whose interests are adversely affected.'" (p. 394)

As Judge Madden indicated below (App. A, pp. 7a-8a, R. 101-2), in all of the cases relied on by the majority the alleged injury was directly related to the subject which was regulated by the public tribunal.

In no prior case involving standing to attack an action of an administrative agency was such standing upheld as to a person who was not a part of the regulated industry or in direct competition with it, and whose alleged injury did not result from the particular agency action in question, and whose alleged injury was in any event both remote and speculative. That is exactly what the majority below has undertaken to sanction in this case.

The importance of the jurisdictional principle here involved makes it imperative that the above conflicts be

resolved now. The inevitable consequences of the decision of the majority below will otherwise burden the Commission and applicants to it with a mass of protests and appeals directed at blocking Commission action. The resulting injury to the administrative processes in the Commission alone, to say nothing of other agencies, would clearly be contrary to the public interest. Moreover, the confusion and delay which would result in the broadcasting industry and the additional load of mass appeals on already congested court calendars would, in Judge Madden's words, be "completely unjustified".

Conclusion

For the foregoing reasons, this petition for writ of certiorari should be granted as prayed.

Respectfully submitted,

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September 16, 1958.

APPENDIX A

Opinion and Judgment of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14166

PHILCO CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

Appeal from an Order of the
Federal Communications Commission

Decided June 19, 1958

Mr. Henry B. Weaver, Jr., with whom *Messrs. Thomas M. Cooley, II*, and *Quinn O'Connell* were on the brief, for appellant.

Mr. Joel Rosenbloom, Counsel, Federal Communications Commission, with whom *Messrs. Warren E. Baker*, General Counsel, Federal Communications Commission, and *Richard A. Solomon*, Assistant General Counsel, Federal Communications Commission, were on the brief, for appellee.

Mr. John F. Sonnett, with whom *Mr. James E. Greeley* was on the brief, for intervenor.

Before FAHY and WASHINGTON, *Circuit Judges*, and MADDEN, *Judge*, United States Court of Claims.*

FAHY, *Circuit Judge:* This is an appeal by the Philco Corporation from dismissal by the Federal Communications Commission of Philco's protest of the grant without a hearing of the applications of the National Broadcasting Corporation, intervenor in this court,[1] for renewal of the licenses of its television broadcast station WRCV-TV, of certain functions auxiliary to that station, and of its radio broadcast station WRCV, all in Philadelphia. The Commission dismissed the protest on the ground that Philco lacked standing as a "party in interest" within the meaning of section 309(c) of the Federal Communications Act.[2]

Philco is not in the industry of broadcasting by either television or radio. It is a manufacturer of radio and electronic equipment. In this business it is in competition with Radio Corporation of America,[3] the sole stockholder of NBC. Philco in its protest alleged that RCA had been receiving advertising advantages from NBC over the stations above referred to, that NBC's ownership and operation of television stations are basic prerequisites to its mode of operation as a network, and that its "option time" and "must buy" practices as a network injure Philco in its capacity as an advertiser seeking to use the television medium. Philco sought a hearing on public interest issues involving trade practices of RCA and NBC that allegedly violated antitrust laws and in other ways reflected on the character qualifications of NBC as a licensee. Its protest also claimed, *inter alia*, that the renewals would result

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* Sitting by designation pursuant to the provisions of Sec. 291(a), Title 28, U. S. CODE.

[1] Referred to as NBC.

[2] 48 Stat. 1085 (1934), as amended, 47 U. S. C. § 309(c) (Supp. V, 1958).

[3] Referred to as RCA.

in undue concentration of control of the media of mass communication in the greater Philadelphia area.

We are not now concerned with these allegations of Philco as to why in the public interest the license renewals should not be granted, or with the merits of other controversies between Philco on the one hand and NBC and RCA on the other. Our question is only whether Philco has standing by filing a protest to advance reasons which might influence the Commission in making a decision in the public interest with respect to the renewals. Indeed, assuming such standing we are not now concerned even with the sufficiency of Philco's protest to warrant a hearing, a question not yet passed upon by the Commission.

By the "option time" and "must buy" devices Philco alleges that NBC had rendered the sponsorship of network programs in preferred listening periods "prohibitively expensive" and had foreclosed the use of those periods to Philco on any non-network basis other than spot advertising, thus depriving it of a choice as to the markets in which it might wish to concentrate sponsored-program television advertising, using NBC affiliates, even if it could meet NBC's charges, which it characterizes as "exorbitant."

We need not reach the question whether NBC's "option time" and "must buy" requirements are closely enough related to the renewals in question to give Philco standing to protest. For there is another basis for standing which seems to us sufficient. NBC as we have said is a wholly owned subsidiary of RCA. RCA, in the words of Philco's protest, is "in direct competition" with Philco "as a manufacturer" and the operation of the Philadelphia stations by NBC strengthens RCA's competitive position to such a degree as to cause a direct economic effect on Philco. Philco alleges that the Philadelphia stations have been aiding RCA in its competition with Philco by broadcasting certain programming which features RCA and grants it advertising preferences not available to Philco and other competitors of RCA. The Commission in its decision states the matter as follows:

The protestant claims that such "preferential publicity" is exemplified by (1) NBC owned stations inserting the phrase "a service of RCA" during station identification breaks; (2) "news" stories broadcast by NBC stations relate to RCA activities "which other news agencies do not find justified by their news value"; (3) broadcasts of NBC color television programs "again and again" advise the public that RCA is "the pioneer and developer of compatible color"; (4) the "Today" program, a NBC Network presentation, emphasizes its origination, when that is a fact, in "RCA Exhibition Hall" where RCA products are allegedly on display; and (5) NBC stations incorporate "RCA" and "RC" into their call letters, thereby giving RCA an "amount and type of advertising which Philco (and other competing manufacturers) cannot hope to obtain by however a large expenditure."

We need not decide whether the competitive situation between Philco and RCA would have given Philco standing to protest the original grants of the licenses to NBC. The present applications are for renewals and come before the Commission after NBC, it is alleged, has been actually using the facilities injuriously to Philco in the manner described by the Commission. We think the actual use of the facilities in this manner by NBC has created a situation which gives rise to standing in Philco to file its protest and, if the protest is found legally sufficient, to advance the alleged antitrust and other practices for consideration by the Commission in passing upon the renewal applications.

Likelihood of economic injury, held in *FCC* v. *Sanders Bros. Radio Station*, 309 U. S. 470, to give standing under section 402(b)[4] as a "person aggrieved or whose interests are adversely affected" has not before arisen in the present context. Drawing the "party in interest"[5]

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[4] 48 Stat. 926 (1934), as amended, 47 U. S. C. § 402 (b) (1952).

[5] "A 'party in interest' is one who is 'aggrieved or whose interests are adversely affected'. § 402(b). *Camden Radio, Inc.* v. *Federal Communications Commission*, 94 U. S. App. D. C. 312, 220 F. 2d 191." *Metropolitan Television Co.* v. *United States*, 95 U. S. App. D. C. 326, 327, 221 F. 2d 879, 880.

line is a difficult process. Commission and courts are called upon to exercise a judgment upon the facts of cases as they arise. On the one hand sufficient breadth must be given to "party in interest" to permit those seriously affected to participate in the administrative and judicial proceedings, without on the other hand placing the proceedings beyond control of the public tribunals. See *National Broadcasting Co.* v. *FCC*, 76 U. S. App. D. C. 238, 241, 132 F. 2d 545, 548, *aff'd* 319 U. S. 239. Here the likelihood of substantial injury to Philco due to the competitive advertising advantages secured by RCA seems to us about as real as the circumstances held to give standing in *National Coal Ass'n* v. *FPC*, 89 U. S. App. D. C. 135, 191 F. 2d 462, and in *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir.), and to bring this case within the principles of *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2d Cir.);[6] *National Broadcasting Co.* v. *FCC*, *supra*, and *United States Cane Sugar Refiners' Ass'n* v. *McNutt*, 138 F. 2d 116 (2d Cir.). See, also, *City of Pittsburgh* v. *FPC*, 99 U. S. App. D. C. 113, 237 F. 2d 741.

We should suppose, to illustrate by an analogy, that if a department store operated television and radio stations so as to obtain substantial preferential advertising advantages over a like store in the community, this competitor would be a party in interest who could protest renewal of the licenses and bring public considerations to bear upon renewal applications. In a very real sense the competitor would be aggrieved or adversely affected. See note 5, *supra*. Of course the public considerations advanced by such a party, as distinct from the reasons which gave rise to standing, must stand on their own feet under the criteria which govern the Commission in passing upon the merits of the applications.

Our decision gives standing to a competitor in the position of Philco only to protest a renewal after it is known that licensed facilities are being used by the competing station

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[6] In *Associated Industries* standing was opened to every consumer of coal.

facturer directly to obtain a preferential [*] economic advantage over the protestant. Furthermore, even in those circumstances the standing here is to protest only with respect to renewal of a license of a station wholly owned or controlled by the competitor, which would not often be the case. We leave other situations for other cases.

As already indicated, we do not pass upon the sufficiency of the protest, which must first be considered by the Commission.

Reversed and remanded.

MADDEN, *Judge*, dissenting: I cannot agree with the decision of the Court. I think it represents an act of generosity with regard to the time and energy of the Federal Communications Commission (FCC), which is completely unjustified. I think that there is not even a possibility that the further proceedings which this decision imposes upon the FCC will result in anything useful.

The basis for standing for Philco, which the Court holds to be adequate, is the fact that it is a manufacturer of electrical equipment, and that RCA, NBC's sole stockholder, is a manufacturer of the same kind of equipment, and therefore a competitor of Philco, and the NBC is using the licenses here in question to the economic injury of Philco as a competitor of RCA.

If Philco has standing, on the basis assigned by the Court, every one of the numerous other manufacturers of electrical equipment has standing. And Philco and all of the others will have standing in every case in which NBC applies for a renewal of its license for any of its several stations.

The basis for standing approved by the Court for Philco is the naked fact that it, like NBC's sole stockholder, RCA, manufactures electrical equipment, and that NBC places

[* By a letter from the clerk of the court dated June 27, 1958, counsel were notified that this opinion had been changed by inserting the words "a preferential" here in place of the article "an".]

the name of RCA prominently before the public in the several ways recited in the Court's opinion. The reiteration of the name of RCA, thus making it familiar to the listening public, even though the products manufactured by RCA were not mentioned, must have advertising value, or the precious seconds required would not be so used.

The Court says that the question of economic injury giving standing "has not before arisen in the present context." That is true. The context, as I see it, is that of competitors in a field which has no relation to the business which is the subject of the public regulation in question. The FCC has nothing to do with the manufacture of electric toasters and washing machines and nothing here relevant to do with the manufacture of television and radio sets. NBC advertises RCA. If RCA pays NBC, it is just transferring money from one pocket to another, since it owns NBC. If it does not pay NBC, it, as owner of NBC, loses the revenue which it would receive if it sold the seconds in question to another advertiser, Philco, *e. g.*

Philco does not allege that it cannot buy time on NBC's Philadelphia station, or NBC's network, at the same price as any other advertiser. If it cannot afford to pay the price, or thinks the service is not worth the price, it is in the same position that all of us are in when we make our choices as to how to spend our funds.

In none of the cases cited by the Court was the alleged economic injury unrelated to the subject which was regulated by the public tribunal. In *Federal Communications Commission* v. *Sanders Radio Station*, 309 U. S. 470 (1940), it was one radio station against another. In *Reade* v. *Ewing*, 205 F. 2d 630 (2d Cir. 1953), it was a consumer complaining of a producer of synthetic vitamins. In *Nat'l Coal Ass'n* v. *Federal Power Commission*, 191 F. 2d 462, 89 U. S. App. D. C. 135, it was coal against gas, and the legislative history of the statute showed that Congress expected the Federal Power Commission to consider the effect upon the interests of the producers of competing fuels of the licensing of extensions of natural gas pipe lines. In *City of Pittsburgh* v. *Federal Power Commission*, 237

F. 2d 741, 99 U. S. App. D. C. 113, it was gas against oil in a context similar to that in *Nat'l Coal Ass'n, supra.* In *Associated Industries* v. *Ickes,* 134 F. 2d 694 (2d Cir. 1943), it was consumers of coal against the authority having the power to fix the price of coal. In *National Broadcasting Company* v. *Federal Communications Commission,* 132 F. 2d 545, 76 U. S. App. D. C. 238, affirmed 319 U. S. 239, it was radio station against radio station.

The problem is really the broad one of whether a radio or television network should be permitted to be owned by the owner of any other business, whether that be the electrical appliance business, the air transportation business, the newspaper business, or any other. So long as such ownership is permitted, it would seem absurd to conclude that the owner could not advertise over his own facilities, though his competitors could do so. The solution of this broad problem of station or network ownership is not to be found in revoking, or refusing to renew the license of NBC's Philadelphia station. It must be accomplished by generally applicable legislation, or by regulation, if the Commission has the power to issue such a regulation. It should be done after due hearing properly announced, at which hearing the numerous persons and organizations interested would have the opportunity to present their views.

The "option time" and "must buy" practices of NBC, as to which the Court finds it unnecessary to decide, seem to me to present no serious problem with regard to standing. These do not even relate to Philco as a manufacturer of electrical equipment in competition with NBC's owner as such a manufacturer. If Philco has standing because of these practices, so does every enterprise which wants to advertise on television, and finds it expensive to do so, whether the enterprise sells cigarettes, soap, airplane tickets or rides on a bus. The court might, I think, have safely fenced out this infinite number of enterprises which might claim standing.

I am not willing to accompany the Court into the new field which it now enters, and must therefore respectfully dissent.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 14,166 April Term, 1958.

PHILCO CORPORATION,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

NATIONAL BROADCASTING COMPANY, INC.,

Intervenor.

United States Court of Appeals for the District of Columbia Circuit, Filed Jun 19 1958.

JOSEPH W. STEWART
Clerk

Appeal from an Order of the
Federal Communications Commission

BEFORE:

FAHY and WASHINGTON, Circuit Judges, and MADDEN, Judge, United States Court of Claims.

Judgment

This case came on to be heard on the record from the Federal Communications Commission, and was argued by counsel.

On consideration whereof, it is ORDERED and ADJUDGED by this Court that the order of the Federal Communications Commission on appeal in this case be, and it is hereby, reversed, and that this case be, and it is hereby, remanded to the Federal Communications Commission for further proceedings not inconsistent with the opinion of this Court.

Dated: Jun 19, 1958.

Per Circuit Judge Fahy.

Separate dissenting opinion by Judge Madden.

APPENDIX B

Opinion and Order of the Federal Communications Commission

FCC 57-994
49068

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON 25, D. C.

In re Applications of NATIONAL BROADCASTING COMPANY, INC. Philadelphia, Pennsylvania For Renewal of Licenses of Stations WRCV, WRCV-TV, KA-4465, KA-7914, KC-8393 and KGC-93.	File Nos. BR-502 BRCT-4 BRTP-22 BRTP-133 BRTP-204 BRTS-21

MEMORANDUM OPINION AND ORDER

By the Commission: (Commissioner Bartley concurring in the result insofar as it dismisses the protest on the ground that the Philco Corporation is not a party in interest; Commissioner Ford not participating.)

1. The Commission has before it for consideration (a) a "Protest" filed on August 14, 1957, by Philco Corporation, Philadelphia, Pennsylvania, pursuant to Section 309(c) of the Communications Act of 1934, as amended, directed against the Commission's action of July 18, 1957, granting without hearing the above-entitled application[1];

[1] The Commission grant of each of the above-entitled applications was made subject to the following condition: "This action is without prejudice to whatever action the Commission may deem appropriate at such time as presently pending anti-trust actions involving Radio Corporation of America and the National Broadcasting Company, Inc., may be terminated."

(b) the "Opposition of National Broadcasting Company, Inc. to Protest of Philco Corporation" filed on August 26, 1957; (c) the "Brief in Reply" filed by Philco on September 4, 1957; and (d) the "Answer to Brief" filed by NBC on September 9, 1957.

2. Protestant claims standing as a "party in interest" within the purview of Section 309(e) of the Communications Act of 1934, as amended, because, as a "manufacturer competing with RCA in the sale of its products and as an advertiser affected by the restrictive practices of NBC[2] and the broadcasting stations which NBC owns and operates"[3] it will suffer economic injury if the grants of the above-entitled applications are permitted, "specifically by reason of the licensing to NBC of the Philadelphia television station (WRCV-TV). . . ." Inasmuch as protestant emphasizes, and particularly directs its allegations, which are hereinafter discussed, to the Commission's grant without hearing of the renewal application of Station WRCV-TV, a summary of the station's licensing history follows.

3. Station WRCV-TV (then WPTZ(TV)) was first licensed to the protestant on April 20, 1943. Prior thereto the station had been licensed on June 28, 1932, to the Philadelphia Battery Storage Company, the protestant's predecessor, as an experimental television broadcast station (call letters W3XE). On May 23, 1953, the Commission

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[2] NBC is a Delaware Corporation having authorized 100,000 shares of no par value voting stock of which 65,000 shares are outstanding and owned 100% by RCA.

[3] In addition to being the licensee of stations which are the subjects of the instant protest, NBC is the licensee of:

WRCA (AM, FM & TV, Ch. 4)	New York, New York
WRC (AM, FM & TV, Ch. 4)	Washington, D. C.
WMAQ (AM & FM)	Chicago, Illinois
WNBQ (TV, Ch. 5)	Chicago, Illinois
KNBC (AM & FM)	San Francisco, California

Furthermore, NBC is the permittee of WBUF (TV, Ch. 17), Buffalo, New York, and sole owner of the New Britain Broadcasting Company, licensee of WKNB (AM), New Britain, Connecticut and permittee of WNBC (TV, Ch. 30), New Britain, Connecticut.

granted the application for consent to the assignment of licenses of Station WPTZ(TV), and remote pickup facilities relating thereto, from protestant to Westinghouse Radio Stations, Inc. (now Westinghouse Broadcasting Co., Inc.) for a consideration of $8,500,000. In allocating the purchase price of $8,500,000 for Station WPTZ(TV), Westinghouse included as a major asset item in the purchase price the valuation of $5,000,000 for a network affiliation contract with NBC. Subsequently, on December 21, 1955, the Commission granted its consent to the assignment of licenses of Stations WTAM, WTAM-FM[4] and WNBK-(TV), Cleveland, Ohio, and all equipment relating to the operation of these stations, from NBC to Westinghouse, and the concurrent assignment of licenses of Stations KYW and WPTZ(TV)[5], Philadelphia, Pennsylvania, and the transfer of all related equipment pertaining thereto, from Westinghouse to NBC. This particular exchange in properties involved the payment by NBC of $3,000,000 to Westinghouse for Station WPTZ(TV). On July 18, 1957, the Commission granted without hearing the above-entitled applications conditionally (see footnote 1) principally because of pending civil anti-trust actions instituted by the Department of Justice against NBC and/or its parent company RCA.[6] It is against the Commission's latter

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[4] Also included in the assignment was the construction permit of WTAM-FM.

[5] KYW and WPTZ(TV) call letters were changed to WRCV and WRCV-TV, respectively, on February 13, 1956, pursuant to consent granted by the Commission on February 1, 1956.

[6] Civil Action No. 97-38 November 19, 1954, instituted against RCA in the U. S. District Court for the Southern District of New York. The complaint alleges, in essence, that "'defendant has attempted to monopolize, and has in fact monopolized . . . interstate trade and commerce . . . in radio-television research, patent holdings and patent acquisitions and the issuance of exchange of radio-television patent licenses, in violation of Section 2 of the Sherman Act."

Civil Action No. 21743, December 4, 1956, instituted against RCA and NBC in the U. S. District Court for the Eastern District of Pennsylvania, alleging, in substance, that the defendants, RCA and NBC, engaged in acts of monopoly or in restraint of trade as a result of the exchange of broadcast properties in Philadelphia and Cleveland between Westinghouse and NBC.

conditional grants that the subject "Protest" is directed.[7]

4. In support of its claim to standing, the protestant alleges, in substance, that it is a manufacturer and seller of electric appliances, equipment, and electronic devices[8] in direct competition with RCA; that RCA dominants [sic] the non-telephonic communications industry and directly, and through its subsidiaries or divisions[9], engages "on a large scale in the business of broadcasting, show business, news gathering, advertising, commercial communications, electronic research, repair and maintenance servicing, technical training education and patent licensing in addition to manufacturing an enormous variety of electronic and related equipment"; that RCA's wholly-owned subsidiary, NBC, "operates both radio and television networks, operates international broadcast stations and represents its own and 13 other broadcast stations (plus 5 others on a partial basis) in national spot advertising sales"; that through its subsidiaries NBC owns "substantial interests in other companies which produce broadcast

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[7] On March 13, 1957, and May 29, 1957, respectively, the Commission similarly granted on condition the application of the New Britain Broadcasting Company (a wholly-owned NBC subsidiary) for renewal of license of Station WNNB, New Britain, Connecticut and NBC's applications for renewal of licenses of Stations WRCA, WRCA-FM, WRCA-TV and Auxiliaries, New York, New York. The aforementioned grants were not protested.

[8] The products manufactured and sold allegedly consist of phonographs, radios, television receivers, tubes, transistors, microwave equipment, computers and other electronic devices, ranges, refrigerators, home freezers, air conditioners, and home laundry equipment.

[9] Besides NBC, and excluding foreign companies, RCA subsidiaries or divisions include RCA Victor Television, RCA Victor Radio & "Victrola", RCA Laboratories, RCA Institutes, Inc., RCA Service Company, Inc., RCA Communications, Inc., RCA Victor Distributing Corp., RCA Electron Tube, RCA Semiconductor, RCA Components, RCA Defense Electronic Products, and RCA Industrial Electronic Products.

shows and motion pictures"[10]; that NBC's owned television stations are so located as to give them "maximum strategic effect" and the "advantage and preferential publicity" which these television stations give to RCA over Philco and other competing manufacturers is enhanced "through the 5 radio stations and 4 FM stations which NBC owns"; that the "preferential publicity" which NBC stations afford RCA is "not available to Philco or other manufacturers who compete with RCA"[11]; that this "advertising" of RCA by NBC constitutes the "grossest and most harmful variety of unfair competition" and is contrary to the "explicit representation" made by NBC in its application (FCC Form 314) for permission to acquire Station WRCV-TV by its failure to disclose in said application its "intention to use the Philadelphia station as a source of advertising for its parent company"; and that NBC's "network option-time" and its "must buy" practices have "rendered the sponsorship of a network program in the preferred listening periods prohibitively expensive" and have "foreclosed the use of those periods to Philco on any non-network basis other than spot advertising," thereby subjecting the protestant to "injuries" in its capacity as an advertiser.

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[10] California National Productions, Inc., New York, N. Y., is a wholly-owned NBC subsidiary and Figaro, Inc., New York, N. Y. is 50% owned by NBC.

[11] The protestant claims that such "preferential publicity" is exemplified by (1) NBC owned stations inserting the phrase "a service of RCA" during station identification breaks; (2) "news" stories broadcast by NBC stations relate to RCA activities "which other news agencies do not find justified by their news value"; (3) broadcasts of NBC color television programs "again and again" advise the public that RCA is "the pioneer and developer of compatible color"; (4) the "Today" program, a NBC Network presentation, emphasizes its origination, when that is a fact, in "RCA Exhibition Hall" where RCA products are allegedly on display; and (5) NBC stations incorporate "RCA" and "RC" into their call letters, thereby giving RCA an "amount and type of advertising which Philco (and other competing manufacturers) cannot hope to obtain by however a large expenditure."

5. The protestant further contends, in substance, that a question as to whether grants of the above-captioned applications are in the public interest exists as a result of the number of civil anti-trust and patent licensing suits pending against RCA and or NBC;[12] that if the alleged "wrong doings" set forth in these suits are the least bit substantiated "neither RCA or NBC could possibly be awarded a grant which must be exercised in the public interest"; that the Commission has recognized the existence of this litigation by the conditions imposed on the renewal of licenses which are the subjects of the instant protest; that such conditional grants are insufficient to discharge the Commission's legal responsibilities imposed by Section 307(d) of the Communications Act which requires as affirmative finding that "public interest, convenience, and necessity would be served thereby"; that the Commission's

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[12] The following actions involve RCA and/or NBC:

Civil Action No. 982	December 17, 1946 (patent licensing)
Civil Action No. 1098	February 6, 1948 (patent licensing)
Civil Action No. 48 C 1848	December 7, 1948 (patent licensing)
Civil Action No. 1247 (consolidating Actions Nos. 982, 1098 and 1247)	August 9, 1949 (patent licensing)
Civil Action No. 89-103	November 9, 1953 (private anti-trust for treble damages)
Civil Action No. 97-38 (see footnote 6)	November 19, 1954 (Government anti-trust)
Civil Action No. 106-159	January 12, 1956 (private anti-trust for treble damages)
Civil Action No. 114-335	November 14, 1956 (private anti-trust for treble damages)
Civil Action No. 115-26	November 23, 1956 (unlawful appropriation of program idea and name)
Civil Action No. 21743 (see footnote 6)	December 4, 1956 (Government anti-trust)
Civil Action No. 21923	January 14, 1957 (private anti-trust for treble damages instituted by the protestant and its subsidiary, Landsdale Tube Company against RCA, General Electric Company, American Telephone and Telegraph Company, Western Electric Company, Inc., and Bell Telephone Laboratories, Inc.)

responsibility cannot be "shifted to the Department of Justice and the courts simply because there is an anti-trust litigation problem involved"; that in its "*Report on Uniform Policy As To Violation By Applicants Of Laws Of The United States*" (1 Pike & Fischer RR, Part III, 91; 495) the Commission has recognized that it has the duty and responsibility to consider violations of federal laws, other than the Communications Act, in evaluating applicants for broadcast facilities; that the Commission's "positive duty" to consider the question of NBC's qualifications to be a licensee is also underlined by reports of recent Congressional committee hearings[13] relating to the "propriety" of a number of NBC's practices; that from its inception in 1919, NBC's parent corporation, RCA, has "pursued a consistent course toward monopoly of the non-telephonic communications industry and as many as possible of its many and allied supporting arts"; and that its "long history of violating the anti-trust laws and engaging in predatory practices through the use of NBC owned stations" precludes the Commission from making the required Section 307(d) findings that the renewal of the above-entitled applications for renewal of licenses to NBC will be in the public interest. The protestant concludes that since the "continued ownership by NBC of its Philadelphia station is economically injurious" to the protestant, both as a competing manufacturer and advertiser with RCA by virtue of the latter's use of NBC and NBC owned stations

[13] Although protestant fails to identify the reports to which it refers by appropriate and proper citations, they are presumably the following: Hearings before House Committee on the Judiciary (Subcommittee No. 5) on Monopoly Problems in Regulated Industries (Television), 84th Cong., 2nd Session (1956), Vols. 1-4; Staff Report, "Television Network Practices," prepared for Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Session (1957). The protestant further requests that these "reports be incorporated [in its protest] in full insofar as they deal with RCA and NBC." It is our view that such attempts to incorporate by reference the voluminous hearing records of Congressional committees, without specific page references, does not constitute the pleading of "allegations of fact" within the meaning of Section 309(c) of the Act.

to gain "unfair competitive advantages" over the protestant, the protestant, "as a party in interest, has a clear right to a full evidentiary hearing on these allegations and any other facts, matters and issues that may arise from the course of the evidentiary proceedings." The protestant, therefore, requests that the above-entitled applications be designated for an evidentiary hearing on the following specified issues:

"1. To determine whether the past history of anti-trust litigation and trade practices of RCA and of NBC, RCA's wholly owned subsidiary, and the current practices of both as revealed by pending litigation, by Congressional inquiry, by the Commission's own files, and otherwise, adversely reflect on NBC's character qualifications to own and operate this broadcast station in the public interest.

"2. To determine whether the renewal of the said license results in an undue concentration of control of the media of mass communication in the Greater Philadelphia area inconsistent with the public interest, convenience and necessity and contrary to Section 3.636 of the Rules of the Federal Communications Commission.

"3. To determine whether the renewal of the said license, taken together with the ownership and control by NBC of media of mass communication, and affiliation therewith both within and outside of the Greater Philadelphia area, results in an undue concentration of control of such media inconsistent with the public interest, convenience and necessity and contrary to Sections 3.636 and 3.658 of the Rules of the Federal Communications Commission.

"4. To determine whether, in view of the evidence adduced under the foregoing issues, the renewal of license of WRCV-TV Philadelphia, to NBC will serve the public interest, convenience and necessity."

6. In its opposition, NBC claims, in substance, that the instant protest fails to comply with the requirements of Section 309(c) of the Act in that the issues attempted to be raised are not supported by facts which are stated with particularity; that there is "no competition, direct or indirect, between NBC and Philco in Philadelphia or elsewhere"; that "absent competition, there can be no direct competitive injury" and, therefore, as a manufacturer, the protestant has no standing within the meaning of Section 309(c); that for the Commission to hold the protestant as a "party in interest" in its capacity as an advertiser would "open the floodgates to protests from tens of thousands of persons who have heretofore not had standing"; that the protestant has failed to "specify facts showing that a renewal of the instant licenses would not be in the public interest, and to raise any genuine issues for the Commission's consideration"; that the protest is "patently sham", and a "compendium of generalities assembled" for the purpose of using the Commission's procedure "as a weapon in its $150,000,000 treble damage action against RCA, and as a further publicity springboard to injure RCA and NBC."

7. The opposition further contends that there is no "impropriety" in NBC stations identifying themselves as "a service of RCA"; that it is a normal practice in the industry; that "NBC and other applicants for Commission approval have never interpreted" Question 9 of the Commission's Form 314 as applying to this practice; that the Commission has approved network ownership and operation of stations as being in the public interest; that NBC's "option time" and "network" policies are "perfectly consistent with the Commission's rules"; that it would not be appropriate for the Commission to order an evidentiary hearing on the anti-trust actions pending against RCA and or NBC; that the fact that "most of these actions have been pending for many years furnishes some indication of the scope of the charges involved and of the length of time it would take the Commission to resolve

these issues"; that the protestant's "review of RCA's history since its inception" fails to allege facts showing monopolization by RCA nor does it "charge an existing violation of law or of the Commission's rules"; and that the protest has been filed as a "publicity weapon by one who has no interest in the license renewal and no standing to protest it."

8. In its reply pleading entitled "Brief in Reply to Opposition to NBC to Protest of Philco Corporation,"[14] the protestant, in substance, reiterates and re-emphasizes certain of its allegations, by claiming that NBC's opposition ignores the basic question presented by the protest, to wit: the public interest involved. It is argued that the protest cannot be dismissed as an "abuse of process," nor does it require the Commission to enforce the anti-trust laws; that the protestant's standing as a "party in interest" within the meaning of Section 309(c) is well established; that the protest alleges with more than the requisite particularity the facts of which the Commission must take notice. Protestant cites a number of Commission and judicial decisions in support of its contention that the protest complies with the statutory requirements set forth in Section 309(c) of the Act.

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[14] The protestant's reply pleading was filed on September 4, 1957. Although Section 309(c) of the Act does not provide for the filing of oppositions and replies thereto, we have, as a matter of policy, accepted such pleadings provided they were submitted within the filing limitations imposed by Section 1.730 of the Commission's Rules relating to the filing of oppositions to petitions and replies to such oppositions. Section 1.730 provides that replies to oppositions "must be filed within 5 days after such oppositions are filed with the Commission." Section 1.733 provides that in computing the above time requirements, "When the period of time prescribed or allowed is less than 7 days, intermediate Saturdays, Sundays, and holidays shall be excluded in the computation." NBC's opposition to the protest was filed on August 26, 1957. Thus, since August 31 was a Saturday, September 1 a Sunday, and September 2 a holiday, the last day for due filing of the protestant's reply was September 3, 1957. Nevertheless, we have given consideration to the content of the reply pleading, and our conclusions herein were reached after such consideration.

9. Section 309(c) of the Communications Act provides, in substance, that within thirty (30) days after the grant without hearing of an application, any "party in interest" may file a protest directed against such grant, provided that such a protest contains allegations of fact which show the protestant to be a "party in interest." The standards for determining whether a person is a "party in interest" for the purposes of maintaining a protest are not delineated in Section 309(c) or elsewhere in the Act. However, it is well established that the test provided by the *Sanders* case[15], the touchstone of any determination of who is a "party in interest" from an economic standpoint under Section 309(c), is one of *direct* and *immediate* competitive injury which gives "standing" without reaching the level of a legal right. See *Associated Industries* v. *Ickes*, 134 F. 2d 694 (2nd Cir. 1943); *United States Cane Sugar Refiners' Assn.* v. *McNutt*, 138 F. 2d 116 (2nd Cir. 1943); *National Coal Association* v. *Federal Power Commission*, 191 F. 2d 462 (D. C. Cir. 1951). Further, the injury must be reasonably certain and definite, and not nominal or speculative. *National Broadcasting Co. (KOA)* v. *Federal Communications Commission*, 132 F. 2d 545 (D. C. Cir. 1942); aff'd 319 U. S. 239 (1943). In the *KOA* case, the Court of Appeals stated the latter requirement thusly, at page 548.

> "Presumably by the decision in the Sanders case the Supreme Court intended that the financial injury must be something more than nominal or highly speculative. It seems not unreasonable to read the opinion as requiring by implication that there be probable injury of a substantial character."

It is therefore incumbent upon a protestant, in meeting the "party in interest" requirement of Section 309(c), to establish that the grant complained of has resulted in or is reasonably likely to result in some injury of a direct, tangible and substantial nature. *T. E. Allen & Sons*, 9

[15] *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 U. S. 470 (1940).

Pike & Fischer RR 197; *Midwest Television, Inc.*, 9 Pike & Fischer RR 611; *Ohio Valley Broadcasting Corporation*, 10 Pike & Fischer RR 452. As we stated in the *Midwest* case,

> "The significance of a clear showing of causal relationship between the action being protested and the alleged economic injury cannot be minimized in this or any similar case since it is a jurisdictional factor which determines whether the protestant has shown standing as a party in interest to protest."

10. When we examine the Philco protest we think it clear that it fails to make any showing as to the probability of substantial immediate injury to Philco if the protested grant is made final. The NBC Philadelphia station, to the extent profitable, will aid NBC financially, and thus indirectly increase the profits of NBC's parent RCA, with which Philco is in competition in another line of commerce.[16] But certainly this is not enough to give Philco standing, any more than it would give standing to a manufacturer of washing machines—a product of another subsidiary of RCA. There must at least be a showing of probable direct loss to the protestant and not merely such indirect injury as might conceivably result from generally strengthening its competitor.[17]

11. We think it equally clear that Philco is not adversely affected by NBC ownership of a Philadelphia television station because of certain alleged practices of NBC as a network to which the protest adverts. These include both those types of practices such as option time abuses and "must buy" requirements allegedly injurious to Philco in its capacity as an advertiser, and the alleged facts that NBC makes frequent references to RCA in connection with its network color programs, the "Today" program, its

[16] Electronic manufacturing as contrasted with radio and television broadcasting.

[17] It is to be noted that the station in question was previously owned by Philco, which sold it to Westinghouse for $8,500,000.

regular network announcements, etc. With respect to all of these matters, it is clear that Philco would be in exactly the same position if NBC owned no station in Philadelphia and its programs were carried over an independently owned affiliate. Since renewal or lack of renewal of WRCV-TV could not affect Philco with respect to this category of action, they do not, even if we assume *arguendo* that they in fact injure Philco, make it aggrieved by the protested grant.

12. This leaves for consideration the miniscule residue of Philco's allegations of injury. It does not allege NBC, in its ownership and operation of WRCV-TV, has unfairly discriminated against Philco, either in its news or other programming or its advertising practices. It suggests only that by such actions as the use of call signs related to the RCA trademark symbol, by announcements of the station as "a service of RCA", and by occasional favorable news mentions of RCA developments, NBC's ownership of a Philadelphia television station aids RCA in its competition with Philco in the manufacture and sales of electronic equipment. We think it clear that any real impact on Philco's competitive position of such activities is so speculative and so indirect that it would make a mockery of the concept of "party in interest" to apply it to these facts.

13. We recognize that the courts have in a number of cases constructed the term "party in interest" broadly where the facts of a particular action would lead a reasonable man to conclude that the complaining party was "likely to be financially injured." *Federal Communications Commission* v. *Sanders Bros. Radio Station*, 309 U. S. 470, 477; see *Metropolitan Television Company* v. *Federal Communications Commission*, 95 U. S. App. D. C. 326, 221 F. 2d 879; *National Coal Association* v. *Federal Power Commission*, 89 U. S. App. D. C. 135, 191 F. 2d 462; *City of Pittsburgh* v. *Federal Power Commission*, 99 U. S. App. D. C. 113, 237 F. 2d 741. But in all of the cases of which we are aware in which standing as a "party in interest" or "person

aggrieved or adversely affected" has been found to exist, the relationship between the agency action complained of and the interest of the complaining party were far more direct and immediate than they are here.

14. Thus, in the *National Coal Association* case, *supra*, coal producers and the United Mine Workers were found to be aggrieved by an action of the Federal Power Commission which, by granting a certificate authorizing the construction of a natural gas pipe line to serve Oak Ridge, Tennessee, threw open an area previously solely dependent upon coal for fuel, for immediate and direct competition by purveyors of natural gas. The situation there, in other words, was closely analogous to the one existing in *Ohio Valley Broadcasting Corp.*, 12 Pike & Fischer RR 452, affirmed on this point *sub nom, Clarksburg Publishing Co.* v. *Federal Communications Commission*, 96 U. S. App. D. C. 211, 225 F. 2d 511, where we found a newspaper had standing to protest the grant of a television station in the community which the newspaper served because of the direct competition for advertising revenues which would be created as a result of the Commission action. Here, of course, the action of the Commission renewing NBC's television license in Philadelphia has, as indicated above, nothing like this real competitive impact on Philco.

15. The *City of Pittsburgh* case, *supra*, also clearly involved an action by the agency having much greater direct impact upon the appellant than is the case here. For in that case the action of the Federal Power Commission authorizing the abandonment of one pipe line and conversion of another which could serve Pittsburgh to meet the needs of the abandoned line directly and immediately affected the interests of the City of Pittsburgh as a consumer of natural gas because of the effect of such action, in the court's view, precluded the possibility of expansion of the facilities serving Pittsburgh in order to meet increasing needs of the consumers in that city. Similarly, in *Metropolitan Television Company* v. *Federal Communications Commission*, *supra*,

the Commission action complained of resulted in objectionable interference being caused for the first time to a not insignificant area to which the protestant station provided service. The protesting station had shown in detail, in its protest, that in seeking advertising accounts it placed great emphasis on its wide area coverage, including coverage of the area which would receive interference. The Court of Appeals concluded that the showing was sufficient to show that it was likely to be financially injured in its competition with other advertising media in the area similarly basing their selling themes upon wide area coverage.

16. We have gone into these cases at some length because they represent the extreme limits of situations in which the courts have found standing upon allegations of financial aggrievement, and because we believe the facts of this case, as set forth above, clearly demonstrate that the protestant has not even approached making the showing that was present in these situations. When Congress adopted the protest procedure in 1952, it adverted, in the Senate Committee Report on the bill, to the fears which had been expressed that the term might be subject to too broad an interpretation. It rejected this contention stating (S. Rep. 44, 82 Cong. 1st Sess., p. 8):

> "Fear has been expressed that use of 'parties in interest' might make possible intervention into proceedings by a host of parties who have no legitimate interest but solely with the purpose of delaying license grants which properly should be made. The Committee does not so construe the term 'party in interest': 'parties in interest' because of electrical interference are fixed and defined by the Supreme Court decision in the KOA case (319 U. S. 239) and the Commission's rules and regulations; 'parties in interest' from an economic standpoint are defined by the Supreme Court decision in the Sanders case (309 U. S. 470)."

We think that the present protestant has clearly failed to make any showing of probable substantial immediate injury of the type which even the most liberal interpretation of the term "party in interest" has heretofore determined to be sufficient. We must, accordingly, conclude that Philco has not shown itself to be a party in interest to the grant of renewal of NBC's license for television station WRCV and that the protest must accordingly be dismissed.

17. Notwithstanding our finding that the protestant has failed to show that it is a "party in interest", in this case as well as in all other instances, the Commission will consider any facts brought to its attention which bear on the question whether its "grant was improperly made or would otherwise not be in the public interest." As is indicated above, issue "1" specified by protestant seeks a determination by the Commission with respect to "the past history of antitrust litigation and trade practices of RCA and NBC." The various outstanding suits listed by protestant were filed in the respective federal courts between 1946 and 1957. We reiterate the view which we have expressed on many occasions in the past, namely, that in circumstances such as those which pertain herein, the Commission will not act on unresolved complaints filed in the courts but will be guided by the determinations reached by said courts with respect to the allegations contained in said complaints. Consistent with this view, the Commission granted the above-entitled application subject to the condition that its action was "without prejudice to whatever action the Commission may deem appropriate at such time as presently pending antitrust actions involving Radio Corporation of America and the National Broadcasting Company, Inc., may be terminated." *In re New Britain Broadcasting Company*, 13 Pike & Fischer RR 915.

18. Issues "2" and "3" seek determinations with respect to violations of the Commission's multiple ownership rules and its network rules. These questions have been raised in the past and have been resolved in favor

of the applicant. To the extent that these matters are involved in pending litigation, we shall await the determination of the courts. Otherwise, we find no basis in the protest for holding a hearing on said issues. Issue "4" is based on findings reached under the other issues and raises no independent questions. *In re New Britain Broadcasting Company*, 14 Pike & Fischer RR 725.

19. In light of the above, the Commission concludes that the protestant has not shown that the Commission's action of July 18, 1957, granting the above-entitled applications was improperly made or was otherwise not in the public interest. Accordingly, the protest herein Is Dismissed.

Federal Communications Commission

/s/ Ben F. Waple

Ben F. Waple
Acting Secretary

[Seal]

Adopted: September 11, 1957

Released: September 16, 1957

APPENDIX C

Relevant Sections of The Communications Act

§309. Application for license—Examination; action by Commission

(a) If upon examination of any application provided for in section 308 of this title the Commission shall find that public interest, convenience, and necessity would be served by the granting thereof, it shall grant such application.

• • •

PROTEST; TIME; FINDINGS; REDRAFT OF ISSUES; BURDEN OF PROOF; POSTPONEMENT OF GRANT

(c) When any instrument of authorization is granted by the Commission without a hearing as provided in subsection (a) of this section, such grant shall remain subject to protest as hereinafter provided for a period of thirty days. During such thirty-day period any party in interest may file a protest under oath directed to such grant and request a hearing on said application so granted. Any protest so filed shall be served on the grantee, shall contain such allegations of fact as will show the protestant to be a party in interest, and shall specify with particularity the facts relied upon by the protestant as showing that the grant was improperly made or would otherwise not be in the public interest. The Commission shall, within thirty days of the filing of the protest, render a decision making findings as to the sufficiency of the protest in meeting the above requirements; and, where it so finds, shall designate the application for hearing upon issues relating to all matters specified in the protest as grounds for setting aside the grant, except in respect to such matters as to which the Commission after affording protestant an opportunity for oral argument, finds, for reasons set forth in the decision, that, even if the facts alleged were to be proven, no grounds for setting aside the grant are presented. The Commission may in such decision redraft the issues urged

by the protestant in accordance with the facts or substantive matters alleged in the protest, and may also specify in such decision that the application be set for hearing upon such further issues as it may prescribe, as well as whether it is adopting as its own any of the issues resulting from the matters specified in the protest. In any hearing subsequently held upon such application issues specified by the Commission upon its own initiative or adopted by it shall be tried in the same manner provided in subsection (b) of this section, but with respect to issues resulting from facts set forth in the protest and not adopted or specified by the Commission, on its own motion, both the burden of proceeding with the introduction of evidence and the burden of proof shall be upon the protestant. The hearing and determination of cases arising under this subsection shall be expedited by the Commission and pending hearing and decision the effective date of ~~the~~ Commission's action to which protest is made shall be postponed to the effective date of the Commission's decision after hearing, unless the authorization involved is necessary to the maintenance or conduct of an existing service, or unless the Commission affirmatively finds for reasons set forth in the decision that the public interest requires that the grant remain in effect, in which event the Commissioner shall authorize the applicant to utilize the facilities or authorization in question pending the Commission's decision after hearing.

• • •

§402. Judicial review of Commission's orders and decisions—Procedure

• • •

RIGHT TO APPEAL

(b) Appeals may be taken from decisions and orders of the Commission to the United States Court of Appeals for the District of Columbia in any of the following cases:

(1) By any applicant for a construction permit or station license, whose application is denied by the Commission.

(2) By any applicant for the renewal or modification of any such instrument of authorization whose application is denied by the Commission.

(3) By any party to an application for authority to transfer, assign, or dispose of any such instrument of authorization, or any rights thereunder, whose application is denied by the Commission.

(4) By any applicant for the permit required by section 325 of this title whose application has been denied by the Commission, or by any permittee under said section whose permit has been revoked by the Commission.

(5) By the holder of any construction permit or station license which has been modified or revoked by the Commission.

(6) By any other person who is aggrieved of whose interests are adversely affected by any order of the Commission granting or denying any application described in paragraphs (1)-(4) of this subsection.

(7) By any person upon whom an order to cease and desist has been served under section 312 of this title.

(8) By any radio operator whose license has been suspended by the Commission.

* * *

INTERVENTION

(c) Within thirty days after the filing of any such appeal any interested person may intervene and participate in the proceedings had upon said appeal by filing with the court a notice of intention to intervene and a verified statement showing the nature of the interest of such party, together with proof of service of true copies of said notice and statement, both upon appellant and upon the Commission. Any person who would be aggrieved or whose interest would be adversely affected by a reversal or modification of the order of the Commission complained of shall be considered an interested party.

* * *

FINALITY OF DECISION; REVIEW BY SUPREME COURT

(j) The court's judgment shall be final, subject, however, to review by the Supreme Court of the United States upon writ of certiorari on petition therefor under section 1254 of Title 28, by the appellant, by the Commission, or by any interested party intervening in the appeal, or by certification by the court pursuant to the provisions of that section.

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OCT 16 1958

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 374

NATIONAL BROADCASTING COMPANY, INC., *Petitioner*,

v.

PHILCO CORPORATION, *Respondent*.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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October 16, 1958

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.